84-288

Office - Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

THE SACRAMENTO BEE, Published by McClatchy Newspapers, a California corporation,
Petitioner,

VS.

THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA MUNICIPAL COURT, FOR THE COUNTY OF SACRAMENTO

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QUESTIONS PRESENTED

1. Whether the press and public have a qualified First Amendment right to attend preliminary hearings.

2. Whether California Penal Code section 868, which purports to give the trial courts power to exclude the press and public from preliminary hearings, is unconstitutional.[1]

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[1]The parties to the proceeding in the Municipal Court were the People of the State of California and Ronny William Mozingo. Petitioner appeared through its counsel in opposition to the defendant's motion to close pretrial proceedings including the preliminary hearing.

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THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SACRAMENTO,
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OPINIONS BELOW

No opinion was issued, reported or unreported, in the courts below.

JURISDICTION

The order of the California Supreme Court denying hearing was dated May 24, 1984 (App. 1); the order of the California Court of Appeal, Third Appellate District denying the petition for writ of prohibition was dated March 29, 1984 (App. 2); the order of the California

[2]In compliance with Rule 28.1 of the Rules of the Supreme Court, petitioner provides the following listing of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates: McClatchy Newspapers; Anchorage Daily News, Inc.

Municipal Court for the County of Sacramento excluding petitioner from the preliminary hearing and "all pretrial proceedings in the [municipal] court" and sealing the records of such proceedings was made on March 3, 1984 (App. 3).

On June 25, 1984 the criminal charges against Ronny William Mozingo in the underlying action were dismissed by the respondent prior to trial. As recently as August 3, 1984, the court refused to allow the press access to the sealed preliminary hearing transcript and records.

The statutory provision believed to confer on this Court jurisdiction to review the order in question is 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment 14, section 1:

> "... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ...

California Penal Code section 868:

> "The [preliminary] examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who was present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 867 of the Penal Code."

STATEMENT OF THE CASE

In this action Ronny William Mozingo is charged with three counts of battery in violation of California Penal Code sections 242 and 243 arising from a confrontation with two Sheriff's deputies in the Sacramento County jail (the "assault case"). Mr. Mozingo is currently in custody awaiting trial on charges of the rape and murder of his

step-mother on December 18, 1979 (the "death penalty case"). His conviction for these crimes was recently reversed by the California Supreme Court based on incompetence of counsel. *People v. Mozingo,* 34 Cal.3d 926 (1983). His dual prosecutions have attracted public interest.

On March 13, 1984 petitioner and other representatives of the press and public were excluded from the preliminary hearing in the assault case and "all pretrial proceedings in the [municipal] court" and from access to the records of such proceedings.

Petitioner appeared through its counsel in opposition to the proposed closure and, despite petitioner's oral request, the magistrate made no specific findings to support its conclusion that closure was essential to preserve the defendant's Sixth Amendment rights; nor is the order narrowly tailored to serve that interest. The magistrate further failed and refused to consider whether alternatives were available to protect the defendant's interest in a fair and impartial trial which were less intrusive on the First Amendment rights of the press and public.

The municipal court's minute order (App. 3) states in its entirety: "Mot[ion] to close prelim[inary hearing] and seal prel[iminary hearing] transcript. Granted."

Because all pretrial proceedings were closed and the transcript is still sealed, petitioner does not know what matters were considered by the municipal court. On June 25, 1984 the assault charges were dismissed prior to trial. The prosecutor has filed a notice of appeal. The death penalty case is still pending.

The record before the municipal court was devoid of facts to support the magistrate's ruling. The entire record consisted of a two page notice of motion and motion "to exclude pretrial publicity" and a declaration of defendant's counsel, Jerry L. Chong in support of the motion attaching seven newspaper articles, only one of which related to the instant assault case. Two articles reported that the death penalty case would be retried. The other four articles related to Douglas Mozingo, Ronny Mozingo's uncle who is a defendant in another murder prosecution pending in the California Superior Court for the County of Sacramento. These few articles were factual and dispassionate.

Mr. Chong's declaration provided in its entirety:

"I, Jerry L. Chong, declare as follows:

"1. I am the attorney appointed to represent Defendant Ronny William Mozingo in the above-entitled action;

"2. The Defendant is charged with three counts of violation of Penal Code Section 242/243;

"3. Defendant is further charged in Superior Court with Case No. 57063 which is a death penalty case. Defendant is represented by attorneys Fern Laethem and Charles Bloodgood in that case;

"4. Defendant's case in Superior Court was reversed by the California Supreme Court on the grounds that previous counsel failed to investigate possible mental defense;

"5. Defendant's uncle, Douglas Mozingo is currently pending a death penalty case in Municipal Court. Douglas Mozingo is charged with three counts of violation of Penal Code Section 187 with special circumstances, nine counts of violation of Penal Code Section 664/187, one count of

violation of Vehicle Code Section 23110(b) and various enhancement allegations. Douglas Mozingo's charges arises out of a 1982 mass shooting and slayings at the Mother Lode Bar. Said incident has received prominent media coverage since that time.

"6. On February 8, 1984, the charges against Douglas Mozingo were dismissed in Superior Court. This resulted in intense media coverage which quoted angry statements from members of the District Attorney's Office. The ground for the dismissal was based upon the actions of Douglas Mozingo's former attorney.

"7. Douglas Mozingo has been identified by the news media as the uncle of Defendant Ronny William Mozingo.

"8. Douglas Mozingo and Defendant Ronny William Mozingo have been charged with death penalty cases; both are currently in Municipal Court; both have had their cases reversed for errors relating to actions by prior counsel; both of their cases have received prominent news media coverage and both defendants have the same last name and are related to one another.

"9. That any additional pretrial publicity may prevent Defendant Ronny William Mozingo from receiving a fair and impartial trial because of the similar names and similar circumstances involved in the death penalty cases of Douglas and Ronny William Mozingo.

"10. I am informed and believe that similar Motions to Preclude Pretrial Publicity will be filed in the death penalty cases by the attorneys representing Defendant Ronny William Mozingo and Douglas Mozingo.

"I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of March, 1984, at Sacramento, California. [signature]"

On March 15, 1984 petitioner filed a direct petition for writ of prohibition or mandate in the California Supreme Court. On March 16, 1984 the California Supreme Court transferred the petition to the Court of Appeal, Third Appellate District. On March 29, 1984 the court of appeal summarily denied the petition.

On April 6, 1984 petitioner filed a petition for hearing in the California Supreme Court. On May 24, 1984 the California Supreme Court summarily denied the petition. Chief Justice Bird and Associate Justice Mosk voted to grant hearing. (App. 1).

At each stage of the proceedings, petitioner asserted that the press and public have a qualified First Amendment right to attend preliminary hearings and that California Penal Code section 868, as applied, violated that right. Petitioner's objection to closure was initially made orally. Thereafter petitioner filed written memoranda of points and authorities in both the California Supreme Court and the Court of Appeal, Third Appellate District. Each court summarily rejected petitioner's contention that closure of the preliminary hearing and other pretrial proceedings violated its First Amendment rights.

To show that the federal question was raised below as required by United States Supreme Court Rules, Rule 21(h), the points argued below are set forth: (1) mandate and prohibition are necessary to correct the respondent court's prejudicial disregard of the petitioner's constitu-

tional rights (Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition or Mandate at pp. 14-16); (2) the press and public have a constitutional right of access to court records and to attend criminal trials including pretrial proceedings (*id.* at pp.16-19); (3) United States Supreme Court decisions determine the standard and procedures by which the constitutionality of closing official court proceedings must be tested (*id.* at pp.19-22); (4) respondent's order closing pretrial proceedings does not satisfy the requirement that it be effective to protect defendant's rights (*id.* at p.22); (5) respondent's restrictive order fails to consider less restrictive alternatives (id. at pp.22-24).

Petitioner's petition for hearing to the California Supreme Court also satisfied Rule 21(h). The points argued were (1) hearing in the California Supreme Court is necessary to clarify the public's constitutional and statutory rights of access to preliminary hearings (Memoradum of Points and Authorities in Support of Petition for Hearing at pp.5-6); (2) the press and public have a constitutional right of access to court records and to attend criminal trials including pretrial proceedings (*id.* at pp.6-9); (3) United States Supreme Court decisions determine the standard and procedures by which the constitutionality of closing official court proceedings must be tested (*id.* at pp.9-11); (4) applying the mandate of the United States Supreme Court and the California Legislature, respondent's "finding" of necessity was insufficient to support closure of the preliminary hearing and transcript (*id.* at pp.11-14).

REASONS FOR ALLOWANCE OF THE WRIT

By failing, upon request of petitioner, (1) to require a factual showing, (2) to make specific findings, (3) to consider alternatives or (4) to tailor narrowly its order, prior to exercising its purported power under California Penal Code section 868 to exclude the press and public from the preliminary hearing in this action, the California Municipal Court for the County of Sacramento decided an important question of federal law which has not been, but should be, settled by this Court. Respondent's decision that the press and public have no qualified First Amendment right to attend preliminary hearings, conflicts with applicable decisions of this Court.

In *Waller v. Georgia,* ..... U.S. ..... (no. 83-321 decided May 21, 1984) this Court extended the accused's Sixth Amendment right to a public trial beyond actual proof at trial to the pretrial suppression hearing. The Court noted that it had not reached the question whether the press and public have a qualified First Amendment right to attend pretrial hearings although the Court had recently extended that right to the *voir dire* proceeding in which the jury is selected. *Press-Enterprise Co. v. Superior Court,* 464 U.S. ..... (1984). Moreover, a majority of the justices had concluded in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979) that the press and public's First Amendment right extends at least to pretrial suppression hearings. *Id.* at 397 (Powell, J. concurring); *id.* at 406 (Blackmun, J. joined by Brennan, White, and Marshall, J.J. dissenting in part).

Contrary to these decisions, the California Supreme Court has found that the press and public have no right of access to preliminary hearings under the federal constitution.

San Jose Mercury-News v. Municipal Court, 30 Cal.3d 498, 506; 179 Cal.Rptr. 772, 777; 638 P.2d 655, 660 (1982). Yet, whether or not exclusion of evidence is an issue at the preliminary hearing, the hearing may turn out to be, as it was in the underlying action, the only judicial proceeding of substantial importance that takes place during criminal prosecutions. In many cases it may provide the sole occasion for public observation of the criminal justice system. Id. 30 Cal.3d at 511; 179 Cal.Rptr. at 779, 780; 638 P.2d at 662, 663. Further, in California suppression-of-evidence issues often are heard during the preliminary hearing. *Id.*

California Penal Code section 868 violates the qualified First Amendment right of the press and public to attend pretrial proceedings because it purports to empower the magistrate to close official court proceedings under circumstances which do not satisfy the requirements of *Press-Enterprise Co. v. Superior Court*, 464 U.S. ..... (1984). The California statute is consistent with the mandate of the First Amendment if but only if the magistrate's "finding" that closure is "necessary in order to protect the defendant's right to a fair and impartial trial" is measured against the same standard and meets the same procedural prerequisites for closing other pretrial and trial proceedings.

The *Press-Enterprise* decision, although not absolutely precluding closed proceedings, provides that closures "must be rare and only for cause shown that outweighs the value of openness." *Id.* (Burger, J., Opinion of the Court) Contrary to the ruling below, the Court held that closure must be "essential to preserve higher values" and "narrowly tailored to serve that interest." In addition the magistrate

must "articulate findings with the requisite specificity" and "consider alternatives to closure and to total suppression of the [court records]." *Id.* (Burger, J., Opinion of the Court). Indeed, Justice Stevens argued that the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. *Id.* (Stevens, J., concurring).

The refusal of the California courts, including respondent, to recognize a constitutional right to attend preliminary hearings renders Penal Code section 868 unconstitutional. The record below is utterly insufficient and devoid of any findings or consideration of alternatives to justify the intrusion on the First Amendment rights of the press and public. California trial courts continue to close preliminary hearings on the most conclusory of findings such that closure orders are issued not in "rare" cases but in newsworthy cases.

This Court should allow the requested writ of certiorari to decide the issue left open in *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979). Absent a ruling of precedential value from this Court, California Penal Code section 868 will continue to be an instrument for repression of the First Amendment rights of the press and public.

August 20, 1984

Respectfully submitted,

WILLIAM B. SHUBB

Appendix 1

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
May 24, 1984

I have this day filed Order
HEARING DENIED

Bird, C.J. &
Mosk, J.
OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: 3 Civ., No. 23830
THE SACRAMENTO BEE

vs.

Muni Ct., Sacramento
(RONNY WILLIAM MOZINGO) RPI

Respectfully,

Clerk

Appendix 2

In the
Court of Appeal of the State of California
In and for the
Third Appellate District
3 Civil 23830
Sacramento 69425F

The Sacramento Bee

vs.

Muncipal Court (Sacramento); Mozingo

By the Court:

The request for stay and petition for writ of prohibition or mandate are denied.

Dated: March 29, 1984

Regan, Acting P. J.

Diepenbrock, Wulff, Plant & Hannegan, Charity Kenyon
Attorneys at Law
455 Capital Mall, #800
Sacramento, CA. 95814 (Petitioner)

Jerry L. Chong
Attorney at Law
700 "L" St., #300
Sacramento, CA. 95814 (Real Party in Interest Mozingo)

Attorney General, by
1515 "K" St.
Sacramento, CA. 95814 (Real Party in Interest People)

Hon. Leighton Hatch
Judge of the Muncipal Court
Courthouse
Sacramento, CA. 95814

Appendix 3

In the Municipal Court,
Sacramento Municipal Court District
County of Sacramento,
State of California

MINUTE ORDER

Defendant's Name	Charges	Docket No.
MOZINGO, RONNY WILLIAM	1. 242/243(c) PC 2. 242/243(b) PC 3. 242/243(b) PC	69425F

Bail Set
$18,000

Offense Date	Date Filed	Agency
1/20/84	1/25/84	SSD

Prosecutor	Defense Attorney
TEA, 2-K. PETERSON	J. CHONG APPT'D

Date	Judge	Dept.	Proceedings
3- 9-84	E. J. GARCIA	C	9:30 A.M. Stip as to disclosure of information from the files of SSD signed. Mot to close prelim and seal prelim transcript cont to PH 3/13 1:45 Mot to gag DA and witnesses denied
3-13-84	L. Hatch	N	Prel Heard. Mot to close Prelim & Seal Prelim Transcript. Granted HTA Ct 1 Cts 2, 3 a Misd to Trail To appear on 3-27-84 9 am Dept 2. Bail to remain same as set